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Supreme Court of the United States

OCTOBER TERM, 196

No. 639

KERR STEAMSHIP COMPANY, INC.; COMPANIA MARITIMA DEL NERVION; NAVIERA AZNAR, S.A.; REX LINE REDERIAKTIEBOLAGET; and SKIBSAKTIESELSKAPET ARIZONA, SKIBSAKTIESELSKAPET ASTREA, SKIBSAKTIESELSKAPET ARUBA, SKIBSAKTIESELSKAPET NORUEGA, SKIBSAKTIESELSKAPET ABACO, A/S ATLANTICA, conducting a joint service between United States Atlantic and Gulf ports and foreign ports pursuant to F.M.B. Agreement No. 7593, as amended, under the trade name HØEGH LINES,

Petitioners,

—against—

UNITED STATES OF AMERICA and FEDERAL MARITIME BOARD,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

HERMAN GOLDMAN,
ELKAN TURK,
ELKAN TURK, JR.,
SOL D. BROMBERG,
Counsel for Petitioners.

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To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The petitioners herein respectfully pray for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit to review a decree of that court entered on November 17th, 1960.

Opinion Below

The opinion of the court below has not yet been officially reported. Together with the final decree, it is printed as Appendix A to this petition.

Jurisdiction

The jurisdiction of this Court is invoked under § 10 of the Act of December 29th, 1950, 64 Stat. 1132 (5 U.S.C. § 1040), and under 62 Stat. 928 (28 U.S.C. § 1254(1)). This petition is timely, the decree of the court below having been entered on November 17th, 1960.

The Questions Presented

The Board,[1] purporting to act pursuant to § 21 of the Shipping Act, 1916, as amended, issued an order dated April 11, 1960 (hereinafter, the § 21 Order), addressed to all common carriers by water serving United States commerce, which directed each carrier to file with the Board copies of all agreements, whether located in the United States or elsewhere, between it and other common carriers by water and/or freight forwarders, or terminal operators, or stevedores, or ship's agents, which were in effect as of January 1, 1960, and which related to seven categories of subject matter described in broad statutory terms. The § 21 Order was entered without notice to any of the carriers

[1] The Federal Maritime Board and its predecessors in the administration of the Shipping Act, 1916, as amended (46 U.S.C. §§ 801, *et seq.*) (see 46 U.S.C.A., note preceding § 801), are herein referred to as the "Board".

and contained no statement of any facts or conditions which necessitate the production of the documents called for nor of any authorized function of the Board to which these documents would be relevant or helpful.

1. Is the § 21 Order invalid because:

(a) Section 21 does not authorize the Board to compel the filing of any agreements or copies thereof;

(b) Section 21 does not authorize the Board to compel the filing of agreements or copies thereof which deal with subject matter outside the Board's jurisdiction, or to which there are parties who are not subject to the Board's jurisdiction;

(c) Section 21 does not authorize the Board to require the production of documents or copies thereof located outside of the United States;

(d) The § 21 Order is so vague and uncertain as to be invalid under § 21, which imposes a forfeiture of $100 per day for each day of noncompliance; and

(e) Lacking any legitimate purpose commensurate with the burden imposed by compliance and lacking any statement of purposes to serve as a guide to the relevancy of documents to be furnished, the § 21 Order violates the carriers' rights under the Fourth Amendment to the Constitution and is invalid under § 6(b) of the Administrative Procedure Act?

2. Did not the Court of Appeals, having found an unresolved issue of fact, viz., whether the § 21

Order was unduly burdensome in relation to the purposes to be served, err in not remanding the proceedings to the Board for hearings and findings, if an administrative hearing was required, or, if no such hearing was required, in not transferring the proceedings for hearing and determination to a United States District Court, in accordance with § 7(b) of the Act of December 29, 1950, 64 Stat. 1130 (5 U.S.C. § 1037(b))?

Constitutional and Statutory Provisions Involved

Amendment IV to the Constitution and the pertinent sections of the Shipping Act, 39 Stat. 728, as amended (46 U.S.C. §§ 801, *et seq.*), and of the Act of December 29, 1950, 64 Stat. 1129 (5 U.S.C. §§ 1031, *et seq.*), and § 6(b) of the Administrative Procedure Act, 60 Stat. 240 (5 U.S.C. § 1005(b)), are set forth in Appendix B to this petition.

Statement of the Case

By the § 21 Order, purporting to have been issued pursuant to the provisions of § 21 of the Shipping Act, 1916, 39 Stat. 736, as amended (46 U.S.C. § 820) (Appendix B, pp. B-3—B-4), the Board directed all common carriers by water subject to the Shipping Act, 1916, as amended, to file with it on or before July 15th, 1960, copies of all contracts, agreements and understandings in effect on January 1st, 1960, without limitation as to the location of such agreements[2], if the other party or parties were other common car-

[2] For brevity, we use "agreements" to include "contracts, agreements and understandings," the documents mentioned in the § 21 Order.

riers by water, freight forwarders, terminal operators, stevedores, or ships' agents, and if the agreements related or pertained to seven broad categories of subject matter (R. 3a-4a).

Petitioner KERR STEAMSHIP COMPANY, INC., is a Delaware Corporation conducting a common carrier service between Pacific Coast ports of the United States and ports in South and East Africa (R. 21a, 41a).[3] Petitioner COMPANIA MARITIMA DEL NERVION is a Spanish corporation conducting a common carrier service between United States Gulf of Mexico and South Atlantic ports and ports in Spain (R. 21a, 41a). Petitioner NAVIERA AZNAR, S.A., is a Spanish corporation conducting a common carrier service between Spain and United States North Atlantic ports and occasionally United States Gulf and South Atlantic ports (R. 21a, 41a). Petitioner REX LINE REDERIAKTIEBOLAGET is a Swedish corporation conducting a common carrier service between United States Atlantic ports and ports in Sweden and occasionally continental European ports (R. 21a, 42a).

The remaining six petitioners are Norwegian corporations conducting a joint service pursuant to an agreement approved by the Board and by it designated Agreement No. 7593 (R. 21a). Pursuant to that agreement these companies conduct a joint common carrier service under the trade name "HØEGH

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[3] Throughout we refer to the Record certified by the court below, consisting of the appendix to our main brief to that court, as "(R. —)". The court below has also certified as an exhibit handed up to the bench at the oral argument, the aide-memoire of the Governments of Norway and Sweden protesting against the enforcement of the § 21 Order. These protests, together with the letter of transmittal of the State Department are printed as Appendix C to this petition.

LINES" from United States Atlantic and Gulf ports to ports in the Mediterranean Sea, the Red Sea and India, returning to United States Atlantic and Gulf ports via the Republic of the Philippines, Indonesia, Federation of Malaya, India and Red Sea and Mediterranean ports (R. 42a).

On Friday, June 10, 1960, the petitioners filed with the Board a motion and petition (R. 5a-16a) seeking clarification and modification of the § 21 Order. In their duly verified petition, petitioners set forth the broad ranges of ports in many corners of the globe at which their vessels call and the necessity of having agreements with agents, stevedores and terminal operators in most of those numerous ports. They pointed out the burden of complying with the requirement of the order that all such agreements which had not previously been filed with the Board must now be copied and the copies filed. They further pointed out that a substantial number of the agreements apparently within the requirements of the § 21 Order were with persons, *e.g.*, agents, not subject to the Shipping Act, with the result that agreements to which they were parties were outside the Board's regulatory jurisdiction. Petitioners further pointed out that they were uncertain whether Item 1(a) of the § 21 Order called for their agreements with their agents, terminal operators and stevedores which fix the compensation of these co-contractors. Item 1(a) calls for agreements relating to "the fixing or regulating of rates, fares [or] charges * * * for the loading, unloading, handling, transporting, storing, or delivering of property." Ordinarily the terms "rates, fares [or] charges," in their statutory context, signify compensation exacted from the public for the services

of common carriers or other public service enterprises.

The petitioners referred to the competitive harm to themselves and to their contracting stevedores, terminal operators and agents if the compensation fixed by their agreements were to be disclosed to the public. Finally, petitioners urged that the Board did not have the power under § 21 of the Shipping Act to compel the production of papers located abroad, and even if the Board had such power, that it should restrict its inquiry to papers located in the United States in order to avoid the ill will and possible retaliation against United States interests which would be consequent upon the invasion of foreign sovereignties for domestic regulatory purposes.

Also on June 10, petitioners filed with the Board an application seeking an amendment of the § 21 Order so that it would become an order to show cause why the order in its original form should not be made, with consequent opportunity to petitioners and others similarly inclined, to be heard as to the reasons why they believed the original order should not be made.

With great dispatch—if not unseemly haste—the Board denied petitioners' motion, petition and application in two orders made on June 13, 1960, the next business day following the filing of these requests for administrative relief (R. 25a-28a). In these orders (hereinafter the "Denial Orders"), the Board took no notice of the requests in the motion and petition for oral argument; nor did it find that the facts were otherwise than as asserted by the petitioners. The Board merely announced that it had considered

the requests for relief and "found the reasons stated therein to be insufficient".

Meanwhile, on June 10, 1960, the petitioners, in order to avoid preclusion of judicial review of the § 21 Order by the 60-day limitation period contained in § 4 of the review statute (5 U.S.C. § 1034), filed their petition in case No. 26334 in the court below (R. 20a-24a) seeking review of the § 21 Order. Following the service of the Denial Orders, petitioners moved for a temporary restraining order and an interlocutory injunction against the enforcement of the § 21 Order which, by its terms, would have required compliance on or before July 15, 1960. After granting a temporary stay to August 1, 1960, the court below suspended the operation of the § 21 Order until 30 days after determination of the petition to review (R. 48a).

Because of uncertainty whether their applications to the Board for administrative relief might be considered to have deprived the § 21 Order of that degree of finality which is prerequisite to judicial review, petitioners, on August 8, 1960, filed their petition in case No. 26429 in the court below seeking review of the Denial Orders (R. 49a-53a). On the stipulation of the parties (R. 54a) the two causes were consolidated for hearing and determination and the interlocutory injunction granted in case No. 26334 was extended so as to restrain the enforcement of the Denial Orders, which by their terms had restated the command to comply with the § 21 Order on or before July 15th (R. 26a, 28a).

That the five common carrier petitioners herein were not unique in resisting the enforcement of the

§ 21 Order is evidenced by the 45 petitions filed by approximately 190 common carriers by water in the United States Court of Appeals for the District of Columbia Circuit seeking review of the § 21 Order.[4]

Many of these carriers have been supported in their resistance to the § 21 Order by aide-memoire delivered to our State Department by the friendly foreign governments under whose flags they operate, protesting against the burdens imposed upon their nationals and the invasion of their sovereignty felt by them to be inherent in the § 21 Order. At the oral argument below Government counsel handed up to the bench a letter dated September 2, 1960, from the Department of State to an Assistant Attorney General, transmitting copies of the aide-memoire of the Embassy of Norway, dated June 23, 1960, and the aide-memoire of the Embassy of Sweden, dated June 21, 1960. (Appendix C to this petition.) In the opinion below, these serious representations to the Government of the United States were cavalierly dismissed as evidence of the annoyance of the governments concerned, which should appropriately be addressed to the Executive and not to the Courts who, as stated in the opinion below, lack power to assuage our friends' annoyance.

It thus appears that the decree of which review is here sought upheld the validity of the § 21 Order (1) which has provoked protests from the principal friendly maritime nations; (2) which is devoid of any disclosure, either on its face or in the administrative

[4] Cases Nos. 15783-15809, 15814, 15838, 15857, 15860, 15879, 15880, 15901, 15902, 15904, 15911, 15917, 15920-15922, 15938, 15947, 15982 and 15983 in the District of Columbia Circuit.

proceedings relating to it, of the public purpose which it is to serve; and (3) compliance with which would involve, according to the only sworn statements in the record (R. 9a-10a; 13a-14a; 44a), a substantial, though not precisely stated, burden of labor and expense, and disclosure of unregulated confidential contractual arrangements of petitioners.

Reasons for Granting the Writ

I. The Decision of the Court of Appeals Is of Such General Importance as to Require Its Review by This Court.

A. The Decision Below Upheld the § 21 Order Which Directs Acts Abroad By a Large Number of Carriers by Water of Many Nationalities Serving United States Foreign Commerce and Would Constitute a Precedent for Similar Orders.

The § 21 Order is directed to "every common carrier by water subject to said [the Shipping] Act" (R. 3a). Petitioners are only five of those carriers. Nearly two hundred other such carriers, most of whom had, like the petitioners here, vainly sought orderly consideration of their objections by the Board, have filed petitions for review of the same order in the United States Court of Appeals for the District of Columbia Circuit.[5] The petitioners in that court include nationals of Norway, Great Britain, India, Italy, Spain, Sweden, Denmark, Finland, The Netherlands, and Yugoslavia. The governments of all of those countries have filed with our Department of

[5] The case numbers in the D. C. Circuit are set forth in Note 4, *supra*. Oral argument on the merits in these cases, which were consolidated for briefing and argument, will be heard January 16, 1961.

State aide-memoire protesting against the enforcement of the § 21 Order. The aide-memoire of Norway and Sweden were made exhibits in the proceedings below (Appendix C hereto), in view of the participation herein of petitioners of Norwegian and Swedish nationality.

Insofar as the § 21 Order transcends national boundaries, it has evoked a storm of protest from nations whose citizens and subjects would be required to search for and copy documents in remote corners of the world in order to comply with an unexplained information-gathering expedition initiated by a subordinate regulatory agency of only one of the many nations having vital, and not always consistent interests in the international transactions involved.

The importance to the foreign commerce and foreign relations of the United States of the novel and rather narrow question of statutory interpretation here involved cannot be over-emphasized.

B. The Decision Below Involves Points of General Applicability To Administrative Fact-Gathering Procedures.

The determination of the validity of the § 21 Order involves the delineation of the outer boundaries of proper administrative fact-gathering power. The court below was of the opinion that *United States* v. *Morton Salt Co.*, 338 U.S. 632 (1950), was authority for sustaining the § 21 Order. If that court was correct, then important limitations on administrative inquiry set forth in *Morton Salt* are to be treated as

high-sounding, but empty, rhetoric. This Court said (338 U.S. at 652-3):

> "Of course a governmental investigation into corporate matters may be of such a sweeping nature and so unrelated to the matter properly under inquiry as to exceed the investigatory power. *Federal Trade Comm'n* v. *American Tobacco Co., supra.* But it is sufficient if the inquiry is within the authority of the agency, the demand is not too indefinite and the information sought is reasonably relevant. 'The gist of the protection is in the requirement, expressed in terms, that the disclosure sought shall not be unreasonable.' *Oklahoma Press Publishing Co.* v. *Walling*, 327 U.S. 186, 208 * * *."

These criteria for administrative inquiry would seem to invalidate the § 21 Order. In order to determine whether "the information sought is reasonably relevant", some standard for determining relevancy is essential. Examination of the § 21 Order (R. 3a-4a) discloses no standard. If one were to ask the relevancy of any document apparently within the scope of the § 21 Order, one would ask in vain; for the next question is, "Relevant to what?"; and neither the § 21 Order nor any of the Board's proceedings with respect to it furnishes an answer.

The lack of a standard of relevancy results in indefiniteness and vagueness as to the documents called for by the § 21 Order. Uncertainty also results from the Board's insistence that the § 21 Order applies to documents which, we urge, are beyond the Board's powers under § 21. These attributes are intolerable where noncompliance involves forfeiture of $100 a day. (46 U.S.C. § 820.)

The complete vindication of the § 21 Order in the decision below seems to have resulted from the court's preoccupation with those portions of *Morton Salt* (338 U.S. at 651-654) which emphasized the evolution in the relationship between courts and administrative agencies in the direction of allowing more liberal scope to administrative activities. However broad this Court's language may have been in that regard, it should hardly be so interpreted as to render meaningless the passage quoted above. The clear import of that language is that even regulated corporate enterprises enjoy some Constitutional protection against mere officious curiosity as to their affairs.

We urge that the court below not only failed to give proper effect to the language of limitation in *Morton Salt*; it also did not take account of the vast difference between the detailed visitorial inquiries into the internal affairs of corporations authorized by § 6 of the Federal Trade Commission Act (15 U.S.C. § 46)—the statutory provision involved in *Morton Salt*—and the more specifically delineated information-gathering authority conferred by § 21 of the Shipping Act.

Doubtless, this Court did not intend, by anything stated in *Morton Salt*, to disregard the legislative view of administrative fact-gathering expressed in § 6(b) of the Administrative Procedure Act (5 U.S.C. § 1005(b)):

> "(b) No process, requirement of a report, inspection, or other investigative act or demand shall be issued, made, or enforced in any manner or for any purpose except as authorized by law. * * *"

The expressions of the Committees which reported this bill demonstrate that as recently as 1946, it was a legislative objective "to preclude 'fishing expeditions'" (Administrative Procedure Act—Legislative History, Sen. Doc. No. 248, 79th Cong., 2d Sess., 1946, pp. 205, 264). It was also the intention that § 6(b) should cast upon an administrative agency the burden, when its investigative process should be challenged, of "demonstrating that upon the law and the facts it is acting within its proper sphere of operations" (*id.* at 363).

It would seem that the court below, by overstating the latitude of administrative investigative authority, has not only given § 21 of the Shipping Act an inadmissible interpretation, but also has established a precedent for administrative excesses by other regulatory agencies.

II. The Court Below Decided Questions Of Importance To The Administration Of The Shipping Act In A Manner Apparently Contrary To The Legislative Purpose.

The court below decided that the power conferred upon the Board by § 21, to require common carriers subject to the Shipping Act to file with it "any periodical or special report, or any account, record, rate, or charge, or any memorandum of any facts and transactions appertaining to the business of such carrier", includes the power to compel the filing of copies of agreements. The court further held that this power extends to agreements wheresoever situated. We urge review to correct error in both regards.

By § 15 of the Shipping Act (46 U.S.C. § 814), Congress commanded common carriers by water to file with the Board every agreement with any other common carrier by water or any "other person subject to this Act", if the agreement accomplishes certain described effects upon competitive relationships. Section 15 proceeds with a comprehensive scheme for the administrative approval or disapproval of agreements to be filed with the Board, and an exemption from the antitrust laws of agreements lawful under § 15. The concluding paragraph of § 15 provides:

> "Whoever violates any provision of this section shall be liable to a penalty of $1,000 for each day such violation continues, to be recovered by the United States in a civil action."

Thus, Congress, in a self-executing section of the Act, dealt specifically and exhaustively with such agreements as were to be filed with and regulated by the Board.

Notwithstanding this inclusive provision with respect to agreements, and notwithstanding the complete absence from § 21 of any mention of contracts, agreements, or understandings, the court below accepted the Government's plea that, because the Board would like to see agreements not required by § 15 to be filed, § 21 should be read as empowering it to do so. This result was accomplished through the medium of an exercise in semantics with respect to the word "transactions" which does appear in § 21.

The court below reasoned that since every agreement presupposes a transaction, it follows that "transactions", in this penal statute, include agreements.

The court below apparently equated an agreement to a memorandum of a transaction. We suggest that this is an innovation in legal conceptions and terminology never contemplated by the draftsmen of the Shipping Act. Where they intended to refer to agreements they did so *in haec verba*. See, *e.g.*, §§ 14, First and Fourth, 14a, 15 (46 U.S.C. §§ 812, First and Fourth, 813, 814). By the same token, where the legislative draftsmen chose to be all-inclusive in describing materials subject to information-gathering process, they used the appropriate langauge. Thus, in § 27 (46 U.S.C. § 826), the Board is authorized by subpoena to compel "the production of books, papers, documents, and other evidence from any place in the United States at any designated place of hearing." It would appear that by memoranda of "transactions" Congress meant to refer to records of completed items of a carrier's business. It requires an unduly strained construction to import contracts, agreements, and understandings into the enumeration in § 21 of the items which the Board may compel carriers to produce.

Even if § 21 may be interpreted as including some agreements, there is no basis under *Morton Salt, supra*, for reading it as authorizing an order for the production of agreements over which the Board has no regulatory jurisdiction. The § 21 Order would require petitioners to file copies of agreements with other carriers, or with freight forwarders, terminal operators, stevedores, or ships' agents, which pertain to the fixing of charges for the loading, unloading, handling, transporting, storing, or delivering of property (R. 3a). The only agreements over which the Board has regulatory jurisdiction are agreements affecting com-

petition in various ways, including the fixing of rates, etc., between common carriers and other such carriers or an "other person subject to this Act". Sec. 15 (46 U.S.C. § 814). The expression, "other person subject to this Act", is defined in § 1 (46 U.S.C. § 801) to mean "any person not included in the term 'common carrier by water,' carrying on the business of forwarding or furnishing wharfage, dock, warehouse, or other terminal facilities in connection with a common carrier by water." The Board itself has held that ships' agents are not other persons subject to the Act. *U.S. Gulf-Atlantic & India, Ceylon & Burma Conference (Agreement No. 7620)*, 2 U.S.M.C. 749 (1945). It seems equally plain that stevedores, who merely furnish labor, do not furnish terminal facilities and, therefore, are not other persons subject to the Act.

Accordingly, the § 21 Order calls for agreements outside the Board's jurisdiction as to the parties thereto. It also calls for agreements outside the Board's jurisdiction as to the subject matter. *Pro tanto*, it is a usurpation of authority not delegated by statute and, therefore, beyond the Board's power.

The court below also held that the Board's power under § 21 is not limited to compelling production of documents or copies thereof located within the United States. By so doing, that court denied any practical significance to the clear geographical limitation set forth in § 27 of the Shipping Act (46 U.S.C. § 826), which in material part provides:

> "That for the purpose of investigating alleged violations of this Act, the board may by subpoena compel the attendance of witnesses and the pro-

> duction of books, papers, documents, and other evidence from any place in the United States at any designated place of hearing. * * *"

It is thus apparent that Congress, being aware of the delicate problems of international relations involved in imposing unilateral regulation on the multi-national transactions involved in United States foreign commerce, where vessels flying the flags of many nations carry goods between the United States and many nations, deliberately withheld from the Board the power to subpoena any documents from abroad in connection with investigations of violations of the Shipping Act. To hold, as did the court below, that the Board may, under § 21, require the production of documents from abroad, without even the prerequisite good cause for a formal investigation of violation of the Act, would appear to attribute folly to Congress. For it would, indeed, be folly to limit the subpoena power to documents located in the United States, and at the same time, to permit the Board, in preliminary or non-investigatory, ex-parte proceedings, by merely issuing an order under § 21, to command the transportation to the United States of copies of documents which would be beyond the reach of its subpoena.

The wisdom of Congress in restricting the Board's information-gathering powers is dramatically evidenced by the flurry of international protests evoked by the Board's instant effort to overreach its powers. The court below saw no middle ground between yielding judicial prerogatives by conceding governing effect to the protests, on the one hand, and merely dismissing them as trivial expressions of annoyance, on the other. The true significance of the protests is, we submit, their vindication of the foresight of the legislature in

precluding the administrative conduct here attempted. It is clear that the legislature may withhold the exercise of the full range of sovereign power in the interest of avoiding international conflict. Where the statute evidences its intention so to do, the courts should honor that intention in interpreting the statute.

III. The Court Below Erred in Denying to Petitioners the Right to Be Heard With Respect to Issues of Fact.

In their verified petition to the Board for modification and clarification of the § 21 Order, petitioners averred that compliance with the full sweep of the Order would be burdensome by reason of the expenditure of time and money involved, and of the disclosure of business secrets outside the scope of the Board's jurisdiction (R. 9a-10a, 13a-14a). As we have seen, the Board, without any hearing, summarily rejected the petition (R. 25a-26a). Petitioners' application to the court below for an interlocutory injunction was supported by the affidavit of the Managing Director of Kerr Steamship Company, Inc., one of the petitioners and agent for the other petitioners. In his affidavit, he reasserted the burdens of compliance (R. 44a). The Board offered no evidence in any form to contradict petitioners' verified pleadings and sworn affidavit. Yet the court below states (Appendix A, p. A-6) that it does not appear that any of the petitioners tried to show the financial burden of compliance, or that it was out of proportion to the purpose of the § 21 Order. The result of this misreading of the record is that petitioners have been denied any opportunity to make proof on an issue of fact on which they have never been challenged, except by the unsworn assertions of Government counsel in briefs.

On this record, petitioners' sworn statements as to burden should be take as true. At the very least, if it is considered that an issue of fact is presented, petitioners should be granted the rights equivalent to due process of law conferred on them by § 7(b) of the review statute (5 U.S.C. § 1037(b)) (Appendix B—pp. B-7—B-8. Thereunder, it is clear that if the court below was of the opinion that a genuine issue of material fact was presented on the issue of burdensomeness, it should, if an administrative hearing was required, have remanded the proceedings to the Board for the purpose of holding a hearing, or, if no administrative hearing was required, have transferred the proceedings for hearing and determination to a United States district court where any of the petitioners has its principal office.

The effective denial by the Board and the court below of an opportunity for the petitioners to be heard on a genuine issue of material fact, in and of itself, would seem to require reversal of the decree below.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for a Writ of Certiorari should be granted.

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Dated: New York, N. Y.
December 30, 1960.

APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 122, 123—October Term, 1960

(Argued September 30, 1960
Decided October 31, 1960)

Docket Nos. 26334, 26429

KERR STEAMSHIP COMPANY, INC., ET AL.,
Petitioners,

—v.—

UNITED STATES OF AMERICA and
FEDERAL MARITIME BOARD,
Respondents.

Before: LUMBARD, *Chief Judge*,
HAND and FRIENDLY, *Circuit Judges*.

This case comes up on a petition filed in this court under § 1034 of Title 5, United States Code, to review orders of the Federal Maritime Board, requiring the petitioners under § 21 of the Shipping Act of 1916 (46 U. S. C. 820) to file copies of certain contracts with the Board. The order was filed on April 11, 1960, and was followed by two later orders denying reconsideration of the first order; all three orders are before us in this proceeding.

ELKAN TURK, JR., *for the petitioners.*
EDWARD APTAKER, *for the respondents.*

HAND, *Circuit Judge*:

This is a joint appeal in the form of a petition to review several orders of the Federal Maritime Board under § 21 of the Shipping Act of 1916, which required a number of common carriers by water to file "a list identifying every contract * * * involving the water-borne commerce of the United States" which they had made "with any other common carrier by water * * * or with any freight forwarder, terminal operator, stevedore, or ship's agent * * * which relates or pertains to" seven specified activities in the "commerce of the United States." The orders also required a "copy" to be filed of every "contract" so identified, of which the carrier had not already filed a copy and added that if "any such contract * * * is oral, it shall be set forth in a memorandum in sufficient detail to represent a true and complete record of the contract."

The first question raised is whether § 21* on which the orders purport to rest supports them. Section 15 of the Act requires all "water borne" carriers to file with the Board contracts made between them and

* Section 21. That the board may require any common carrier by water, or other person subject to this Act, or any officer, receiver, trustee, lessee, agent, or employee thereof, to file with it any periodical or special report, or any account, record, rate, or charge, or any memorandum of any facts and transactions appertaining to the business of such carrier or other person subject to this Act. Such report, account, record, rate, charge, or memorandum shall be under oath whenever the board so requires, and shall be furnished in the form and within the time prescribed by the Board. Whoever fails to file any report, account, record, rate, charge, or memorandum as required by this section shall forfeit to the United States the sum of $100 for each day of such default.

Whoever willfully falsifies, destroys, mutilates, or alters any such report, account, record, rate, charge, or memorandum, or wilfully files a false report, account, record, rate, charge, or memorandum shall be guilty of a misdemeanor, and subject upon conviction of a fine of not more than $1,000, or imprisonment for not more than one year, or to both such fine and imprisonment.

other such carriers, or between a carrier and any other "person subject to this Act," whom § 1 of the Act, defines as anyone not a carrier, "carrying on the business of forwarding or furnishing wharfage, dock, warehouse, or other terminal facilities in connection with a common carrier by water." Thus it would seem that, so far as concerns contracts between the carriers themselves and other "persons subject to the Act," § 21 was not necessary; such contracts fell within § 15. The petitioners argue that for this reason we should not hold that the "transactions" as used in § 21 included "contracts between carriers." That would seem to us a wanton perversion of the natural meaning of the words, even if both sections had the same scope. Every "contract" presupposes a "transaction," for it results from some mutual dealing between the parties, and to limit its scope to such dealings as do not result in a contract would, especially in this setting, do the utmost violence to its normal meaning. Any significance of the substitution of "transaction" in § 21 as a limitation disappears when we remember that that section covers more than "contracts," and in addition that it covers more contracts than those covered by § 15. There is likewise no significance in the provision of § 407(a) of the Federal Aviation Act of 1958, 49 U. S. C. § 1377(a), which was previously in the same section of the Civil Aeronautics Act of 1938, empowering the Civil Aeronautics Board to "require any air carrier to file with it a true copy of each or any contract agreement, understanding, or arrangement, between such air carrier and any other carrier or person, in relation to any traffic affected by the provisions of this chapter." Since the Aviation Act contains no provision of the breadth of § 21 of the Shipping Act, the specific grant

to the Civil Aeronautics Board of the power to require the filing of contracts of air carriers implied no recognition that the general language of § 21 had not conferred such a power upon the Maritime Board with respect to carriers by water.

Nor can we agree that the orders were too vague to be valid. It is of course true that they are in general terms and that their ambit is not defined with verbal exactness; but precisely limited demands would have been impossible in an investigation of the kind proposed. Decisions of a carrier as to what "transactions" were within the orders if made in good faith, would not necessarily result in fines of $100 a day, although the court disagreed with the carrier's understanding of what "transactions" were covered. It appears to us that the orders are as definite as the subject-matter permitted, and did not impose any unreasonable risk upon a carrier who in good faith should submit all contracts that seemed to it to be within the intent of the orders.

Next, the petitioners complain that the orders were beyond the competence of the Board because they required the petitioners to produce copies of contracts that were outside the United States. It is to be noted in the first place that the orders do not require the production of the original "memorandums" of contracts with other carriers, but only copies. Even were we to assume for argument, which we do not mean to suggest, that the Board could not have demanded production and inspection of such originals if they were outside the United States, that is not the question before us. The investigation was to acquaint the Board with what were the practices of carriers engaged in commerce with the United States, and it was essential to that purpose to know what took place outside the

United States as well as inside. Nobody would argue, we should suppose, that oral agreements made in other countries could have no effect upon the commerce of the United States, which was the subject being investigated. The Board could not proceed unless it found out what were the arrangements between carriers and between a carrier and others who took part in its preparations, no matter where the "transactions" occurred. It would be absurd, for example, to hold that the Board had no power to examine a witness as to what had been agreed abroad, if that was relevant to the terms and conditions of the eventual carriage. We can see no valid distinction between such an inquiry and the production of a copy of the agreement—"transaction"—in which those concerned formulated their obligations. The extent to which the information could be forcibly elicited is another matter, not in the least relevant to whether it may be lawfully demanded. Sections 27 and 29 provide other procedure, but not necessarily to the exclusion of an action under § 15 or § 21. The process by which an order is to be enforced is one thing, its validity is another.

Next, the petitioners argue that to require them to prepare and file copies of all their "transactions" in foreign commerce would violate their constitutional protection from unlawful search and seizure. It is true that the order of such a tribunal as the Board may be so burdensome as to require modification (*United States* v. *Morton Salt Co.*, 338 U. S. 632, 651-654 [1950]) and that even in the case of corporations, its discretion is not beyond any judicial review whatever. But "corporations can claim no equality with individuals in the enjoyment of the right of privacy" (p. 652). "Even if one were to regard the request for information in this case as caused by nothing more

than official curiosity, nevertheless law-enforcing agencies have a legitimate right to satisfy themselves that corporate behavior is consistent with the law and the public interest" (p. 652). It does not appear that any of the petitioners tried to show what was the financial burden of listing and copying the contracts in question, or that it was out of all reasonable proportion to any purpose that the proposed investigation might have. Until it did, the carrier could not resist complete disclosure; and, if it did, it could resist only so much as it proved to be unreasonable.

Nor does the accompanying complaint impress us any more: that is, that an omnibus disclosure of the kind demanded might include secret arrangements between carriers, or a carrier and another person whether or not he was "subject to the Act." That was presumably one of the purposes of the whole investigation, and it is strange indeed to have it argued that a common carrier, may refuse to tell what are its secret agreements with others engaged in the enterprise, when the inquiry was to learn among other things what those secret arrangements were, and how far they might trench upon that freedom of commerce that it was one of the purposes of the Act to secure. If such an inquiry annoys other governments, as apparently it does, their complaint must be addressed to the Executive; it is not a matter with which courts have any power to deal.

Petitions denied.

Final Decree

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Docket Nos. 26334, 26429

KERR STEAMSHIP COMPANY, INC., ET AL.,

Petitioners,

v.

UNITED STATES OF AMERICA and
FEDERAL MARITIME BOARD,

Respondents.

This cause having come on for hearing on the record of proceedings before the Federal Maritime Board and upon the briefs and arguments of counsel, and the Court having filed its opinion on October 31, 1960, denying the petitions by Kerr Steamship Company, Inc., et al., to review orders of said Board:

It is Ordered, Adjudged and Decreed that the petitions of Kerr Steamship Company, Inc., et al., seeking a review of orders of the Federal Maritime Board in these cases be and they are hereby denied and the Board's orders are hereby affirmed; and

It is further Ordered, Adjudged and Decreed that the temporary suspension of the operation of said orders granted petitioners by order of this Court on July 14, 1960, is hereby vacated, and pursuant to the terms of said order of July 14, 1960, petitioners shall comply within 30 days from the date of entry of this decree with the said orders of the Federal Maritime Board.

/s/ J. E. LUMBARD
Chief Judge

/s/ LEARNED HAND
Circuit Judge

/s/ HENRY J. FRIENDLY
Circuit Judge

Filed November 17, 1960

APPENDIX B

I. Amendment IV to the Constitution of the United States

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

II. Selected provisions of the Shipping Act, 1916 (extracted from Title 46, U.S.C.A.).

Sec. 1. (46 U. S. C. § 801.) When used in this chapter [Act]:

The term "common carrier by water in foreign commerce" means a common carrier, except ferryboats running on regular routes, engaged in the transportation by water of passengers or property between the United States or any of its Districts, Territories, or possessions and a foreign country, whether in the import or export trade: *Provided*, That a cargo boat commonly called an ocean tramp shall not be deemed such "common carrier by water in foreign commerce".

The term "common carrier by water in interstate commerce" means a common carrier engaged in the transportation by water of passengers or property on the high seas or the Great Lakes on regular routes from port to port between one State, Territory, District, or possession of the United States and any other State, Territory, District, or possession of the United

States, or between places in the same Territory, District, or possession.

The term "common carrier by water" means a common carrier by water in foreign commerce or a common carrier by water in interstate commerce on the high seas or the Great Lakes on regular routes from port to port.

The term "other person subject to this Act" means any person not included in the term "common carrier by water," carrying on the business of forwarding or furnishing wharfage, dock, warehouse, or other terminal facilities in connection with a common carrier by water.

* * * *

Sec. 15. (46 U. S. C. § 814.) Every common carrier by water, or other person subject to this chapter [Act], shall file immediately with the commission [board] a true copy, or, if oral, a true and complete memorandum, of every agreement, with another such carrier or other person subject to this chapter [Act], or modification or cancellation thereof, to which it may be a party or conform in whole or in part, fixing or regulating transportation rates or fares; giving or receiving special rates, accommodations, or other special privileges or advantages; controlling, regulating, preventing, or destroying competition; pooling or apportioning earnings, losses, or traffic; allotting ports or restricting or otherwise regulating the number and character of sailings between ports; limiting or regulating in any way the volume or character of freight or passenger traffic to be carried; or in any manner providing for an exclusive, preferential, or cooperative working arrangement. The term "agreement" in this section includes understandings, conferences, and other arrangements.

The commission [board] may by order disapprove, cancel, or modify any agreement, or any modification or cancellation thereof, whether or not previously approved by it, that it finds to be unjustly discriminatory or unfair as between carriers, shippers, exporters, importers, or ports, or between exporters from the United States and their foreign competitors or to operate to the detriment of the commerce of the United States, or to be in violation of this chapter [Act], and shall approve all other agreements, modifications, or cancellations.

Agreements existing at the time of the organization of the commission [board] shall be lawful until disapproved by the commission [board]. It shall be unlawful to carry out any agreement or any portion thereof disapproved by the commission [board].

All agreements, modifications, or cancellations made after the organization of the commission [board] shall be lawful only when and as long as approved by the commission [board], and before approval or after disapproval it shall be unlawful to carry out in whole or in part, directly or indirectly, any such agreement, modification, or cancellation.

Every agreement, modification, or cancellation lawful under this section shall be excepted from the provision of sections 1-11 and 15 of Title 15, and amendments and Acts supplementary thereto.

Whoever violates any provision of this section shall be liable to a penalty of $1,000 for each day such violation continues, to be recovered by the United States in a civil action.

* * * *

Sec. 21. (46 U. S. C. § 820.) The Commission may require any common carrier by water, or other person

subject to this chapter [Act], or any officer, receiver, trustee, lessee, agent, or employee thereof, to file with it any periodical or special report, or any account, record, rate, or charge, or any memorandum of any facts and transactions appertaining to the business of such carrier or other person subject to this chapter [Act]. Such report, account, record, rate, charge, or memorandum shall be under oath whenever the board [sic] so requires, and shall be furnished in the form and within the time prescribed by the commission. Whoever fails to file any report, account, record, rate, charge or memorandum as required by this section shall forfeit to the United States the sum of $100 for each day of such default.

Whoever willfully falsifies, destroys, mutilates, or alters any such report, account, record, rate, charge, or memorandum, or willfully files a false report, account, record, rate, charge or memorandum shall be guilty of a misdemeanor, and subject upon conviction to a fine of not more than $1,000, or imprisonment for not more than one year, or to both such fine and imprisonment.

* * * *

Sec. 27. (46 U. S. C. § 826.) For the purpose of investigating alleged violations of this chapter [Act], the commission may by subpoena compel the attendance of witnesses and the production of books, papers, documents, and other evidence from any place in the United States at any designated place of hearing. Subpoenas may be signed by any member of the commission, and oaths or affirmations may be administered, witnesses examined, and evidence received by any member or examiner, or, under the direction of the commission, by any person authorized under the laws of the United States or of any State, Territory, Dis-

trict, or possession thereof to administer oaths. Persons so acting under the direction of the commission and witnesses shall, unless employees of the commission, be entitled to the same fees and mileages as in the courts of the United States. Obedience to any such subpoena shall, on application by the commission, be enforced as are orders of the commission other than for the payment of money.

Sec. 28. (46 U. S. C. § 827.) No person shall be excused on the ground that it may tend to incriminate him or subject him to a penalty or forfeiture, from attending and testifying, or producing books, papers, documents, and other evidence, in obedience to the subpoena of the commission or of any court in any proceeding based upon or growing out of any alleged violation of this chapter [Act]; but no natural person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing as to which, in obedience to a subpoena and under oath, he may so testify or produce evidence, except that no person shall be exempt from prosecution and punishment for perjury committed in so testifying.

Sec. 29. (46 U. S. C. § 828.) In case of violation of any order of the commission, other than an order for the payment of money, the commission, or any party injured by such violation, or the Attorney General, may apply to a district court having jurisdiction of the parties; and if, after hearing, the court determines that the order was regularly made and duly issued, it shall enforce obedience thereto by a writ of injunction or other proper process, mandatory or otherwise.

* * * *

Sec. 31. (46 U. S. C. §830.) The venue and procedure in the courts of the United States in suits brought to enforce, suspend, or set aside, in whole or in part, any order of the commission shall, except as otherwise provided, be the same as in similar suits in regard to orders of the Interstate Commerce Commission, but such suits may also be maintained in any district court having jurisdiction of the parties.

* * * *

III. Selected provisions of Public Law 901, 81st Cong., 2d Sess. (1950) (extracted from Title 5, U. S. C. A.).

Sec. 1. (5 U. S. C. §1031.) As used in this chapter [Act]—

(a) "Court of appeals" means a court of appeals of the United States.

* * * *

(c) "Petitioner" means the party or parties by whom a petition to review an order, reviewable under this chapter [Act], is filed.

(d) When the order sought to be reviewed was entered by the Federal Communications Commission, "agency" means the Commission; when such order was entered by the Secretary of Agriculture, "agency" means the Secretary; when such order was entered by the United States Maritime Commission, or the Federal Maritime Board, or the Maritime Administration, "agency" means that Commission or Board, or Administration, as the case may require.

Sec. 2. (5 U. S. C. §1032.) The Court of appeals shall have exclusive jurisdiction to enjoin, set aside,

suspend (in whole or in part), or to determine the validity of, all final orders (a) of the Federal Communications Commission made reviewable in accordance with the provisions of section 402 (a) of Title 47, and (b) of the Secretary of Agriculture made under the Packers and Stockyards Act, 1921, as amended, and under the Perishable Agricultural Commodities Act, 1930, as amended, except orders issued under sections 210 (e), 217a, and 499g(a) of Title 7, and (c) such final orders of the United States Maritime Commission or the Federal Maritime Board or the Maritime Administration entered under authority of the Shipping Act, 1916, as amended, and the Intercoastal Shipping Act, 1933, as amended, as are now subject to judicial review pursuant to the provisions of section 830 of Title 46.

Such jurisdiction shall be invoked by the filing of a petition as provided in section 1034 of this title.

* * * *

Sec. 7. (5 U. S. C. § 1037.)

(a) Petitions to review orders reviewable under this chapter [Act], unless determined on a motion to dismiss the petition, shall be heard in the court of appeals upon the record of the pleadings, evidence adduced, and proceedings before the agency where the agency has in fact held a hearing whether or not required to do so by law.

(b) Where the agency has held no hearing prior to the taking of the action of which review is sought by the petition, the court of appeals shall determine whether a hearing is required by law. After such determination, the court shall (1) where a hearing is required by law, remand the proceedings to the agency

for the purpose of holding a hearing; (2) where a hearing is not required by law, pass upon the issues presented when it appears from the pleadings and affidavits filed by the parties that no genuine issue of material fact is presented; and (3) where a hearing is not required by law, and a genuine issue of material fact is presented, transfer the proceedings to a United States district court for the district where the petitioner or any petitioner resides or has its principal office for hearing and determination as if such proceedings were originally initiated in the district court. The procedure in such cases in the United States district courts shall be governed by the Federal Rules of Civil Procedure.

* * * *

SEC. 10. (5 U. S. C. § 1040.) An order granting or denying an interlocutory injunction under section 1039 (b) of this title shall be subject to review by the Supreme Court of the United States upon writ of certiorari as provided in section 1254 (1) of Title 28: *Provided*, That application therefor be duly made within forty-five days after the entry of such order. The final judgment of the court of appeals in a proceeding to review under this chapter [Act] shall be subject to review by the Supreme Court of the United States upon a writ of certiorari in accordance with the provisions of section 1254 (1) of Title 28: *Provided further*, That application therefor be duly made within ninety days after the entry of such judgment. Either the United States or the agency or an aggrieved party may file such petition for a writ of certiorari. The provisions of section 1254 (3) of Title 28, regarding certification, and of section

2101 (e)[1] of Title 28, regarding stays, shall also apply to proceedings under this chapter [Act].

* * * *

IV. Sec. 6(b) of the Administrative Procedure Act (extracted from Title 5, U.S.C.A.)

Sec. 6. (5 U. S. C. § 1005.)

Except as otherwise provided in this chapter [Act]—

* * * *

(b) No process, requirement of a report, inspection or other investigative act or demand shall be issued, made, or enforced in any manner or for any purpose except as authorized by law. Every person compelled to submit data or evidence shall be entitled to retain or, on payment of lawfully prescribed costs, procure a copy or transcript thereof, except that in a nonpublic investigatory proceeding the witness may for good cause be limited to inspection of the official transcript of his testimony.

* * * *

[1] Sub-section (e) must have been inadvertently referred to, in place of sub-section (f). The latter provides for stays pending certiorari, whereas the former does not deal with stays. The error seems to have crept into the statute due to the circumstance that when the Hobbs bill was introduced, the present sub-section (f) was designated subdivision (e); but that before the Hobbs bill was enacted, due to an amendment of 28 U. S. C. § 2101, in the meantime (Act of May 24, 1949, § 106 (b), 63 Stat. 104) the former subdivision (e) had become subdivision (f).

APPENDIX C

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

KERR STEAMSHIP CO., INC., ET AL.,

Petitioners,

v.

UNITED STATES OF AMERICA and FEDERAL MARITIME BOARD,

Respondents.

KERR STEAMSHIP CO., INC., ET AL.,

Petitioners,

v.

UNITED STATES OF AMERICA,

Petitioners,

v.

UNITED STATES OF AMERICA and FEDERAL MARITIME BOARD,

Respondents.

I, A. DANIEL FUSARO, Clerk of the United States Court of Appeals for the Second Circuit, do hereby certify that the attached exhibits were used on the argument of the above entitled cases in this court.

A. DANIEL FUSARO
Clerk

Dated: December 2, 1960

ADDRESS OFFICIAL COMMUNICATIONS TO
The Secretary of State
Washington 25, D. C.

[SEAL]

DEPARTMENT OF STATE
Washington

In reply refer to
SH

September 2, 1960

Dear Mr. Bicks:

The Department of State has been requested by the Embassies of Denmark, Norway and Sweden to transmit to the United States Court of Appeals for the District of Columbia Circuit a copy of their Embassies' aide-memoire of June 22, 1960, June 23, 1960, and June 21, 1960, respectively. The aide-memoire outline the views of these Governments with respect to the recent orders issued under Section 21 of the Shipping Act of 1916, directing that memoranda, records and statements pertaining to the shipping operations of certain Danish, Norwegian, and Swedish steamship companies be filed with the Board.

Accordingly, the Department would appreciate the Department of Justice taking appropriate action to present the enclosed copies to the Court. The aide-memoire are transmitted in accordance with the Department's function of reporting to other agencies of the Government information or communications re-

ceived from foreign governments, and it should be understood that the Department has no intention of intruding upon the judicial processes of the court.

Sincerely yours,

EDWARD A. BOLSTER
Edward A. Bolster
Director Office of Transport
and Communications

Enclosures:

1. From the Embassy of Denmark, dated June 22, 1960
2. From the Embassy of Norway, dated June 23, 1960
3. From the Embassy of Sweden, dated June 21, 1960

The Honorable
ROBERT A. BICKS,
Assistant Attorney General,
Department of Justice.

NORWEGIAN EMBASSY
Washington, D. C.

AIDE MEMOIRE

The Embassy of Norway has been instructed to draw attention to the Order issued on April 13, 1960 by the Federal Maritime Board which calls for the production of a wide range of documents by July 15 by every common carrier by water, subject to the Shipping Act of 1916.

By note of February 8, 1960, the Norwegian Embassy brought to the attention of the Department of State the investigation which was initiated by the Department of Justice when subpoena duces tecum were served on a large number of firms representing Norwegian shipping companies in the United States. The arguments set forth in the said note apply also to the proceedings now instituted by the Federal Maritime Board.

The Norwegian Embassy wishes to stress its concern over this new unfortunate interference in the activities of the Norwegian shipping industry, which plays such a vital part in the economy of Norway. Furthermore, the Order now issued by the Federal Maritime Board seems not to serve the interests of harmonious international trade.

The request for production of contracts, agreements and understandings includes those which have been made and executed outside the territorial limits of the United States and thus appears to be beyond the United States' jurisdiction under the general principles of international law.

Furthermore, the Order by the Federal Maritime

Board requests a wide range of information which would impose on the Norwegian companies a most unreasonable burden of labour and expense and seriously interfere with the conduct of their business.

The Norwegian Government also fears that this new wide investigation instituted by the Federal Maritime Board could inspire other nations to take similar actions, which again would lead to an exposure of individual business practices. Such a development would be highly detrimental to all shipping-nations – including the United States.

It is the sincere hope of the Norwegian Embassy that the Order by the Federal Maritime Board be modified by substantially limiting the material requested from Norwegian shipping companies.

Washington, D. C. June 23, 1960.

No. 161
RH IJF

Aide Memoire

By note of February 29, 1960, the Swedish Embassy brought to the attention of the Department of State the investigation of the shipping industry, which was initiated by the Department of Justice in November 1959. A subpoena *duces tecum* was served on a Swedish shipping company to produce a great variety of documents relating to the company's activities inside as well as outside the United States. The Embassy informed the Department of State of the concern with which the Swedish Government regarded the action taken by the Department of Justice. An unreasonable burden of labour and expense would be placed

upon the company because of the wide scope of the investigation. It would involve an extensive documentation from outside the United States containing a great wealth of commercial information, which would hardly seem to be relevant to the United States authorities.

On April 13 the Federal Maritime Board issued an Order, in which every common carrier by water, subject to the Shipping Act of 1916, was called upon to produce by July 15, 1960, all "contracts, agreements and understandings". Several Swedish shipping lines have received this Order from the Federal Maritime Board.

In view thereof the Swedish Embassy wishes to restate its position as expressed in its note of February 29 and further stress its concern over this new unfortunate interference in the activities of the international shipping industry. The Order issued by the Federal Maritime Board would definitely not seem to serve the interests of harmonious international trade.

The Order of the Federal Maritime Board is based on the United States Shipping Act of 1916, Section 21. The Swedish Embassy finds it necessary to point out that Swedish companies are not subject to United States law as far as their trade outside the United States is concerned.

It is the sincere hope of the Swedish Embassy that it will be found possible to modify the Order of the Federal Maritime Board by substantially limiting the amount of material required in order to keep the detrimental results on the normal activities of Swedish shipping companies to a minimum and in order to ease the burden which this new investigation imposes upon them.

In addition an extension of the time limit set by the Board within which the documents are to be produced would facilitate the task of the Swedish companies involved in complying with such requests of the Board which are felt to be reasonable and which are within the jurisdiction of the United States. The Swedish Government is of the opinion that consultations between the shipping companies and the appropriate United States and Swedish authorities would facilitate reaching an agreement as regards the material required.

Should similar far-reaching investigations by United States Government Agencies, beyond the jurisdiction of the United States, be contemplated in the future it is the hope of the Swedish Embassy that advance consultations could be arranged with the United States Government in order to limit the harmful effects on the trade relations between the two countries in which shipping plays such an important part.

Washington, D. C., June 21, 1960

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In the Supreme Court of the United States

OCTOBER TERM, 1960

KERR STEAMSHIP CO., ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA AND
FEDERAL MARITIME BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE RESPONDENTS

ARCHIBALD COX,
Solicitor General,
Department of Justice, Washington 25, D.C.

JAMES L. PIMPER,
General Counsel,
Federal Maritime Board, Washington 25, D.C.

In the Supreme Court of the United States

OCTOBER TERM, 1960

No. 623

KERR STEAMSHIP CO., ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA AND
FEDERAL MARITIME BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE RESPONDENTS

The decision below (Pet. Appendix A) affirmed an order of the Federal Maritime Board issued under Section 21 of the Shipping Act (46 U.S.C. 820) requiring every common carrier by water subject to the Shipping Act of 1916, as amended, to file with the Board copies of specified types of agreements. Although the Government believes that this decision was correct and that it raises no issues of sufficient general importance to warrant further review, we suggest, for the reasons set forth below, that the Court may wish to defer action on the present petition pending disposition of a group of related cases arising out of the same Board order which are now pending in a different circuit.

582096—61

As the petition indicates (Pet. 8-9), some 45 consolidated petitions involving the validity of the same order (but also presenting in some instances special issues not involved in the instant case) are now *sub judice* in the Court of Appeals for the District of Columbia Circuit. See *Montship Lines, Limited, et al.* v. *United States of America, et al.*, No. 15,783 *et al.* Since proceedings challenging the same Board order were originally instituted in the Second Circuit and District of Columbia Circuit on the same date, June 8, 1960,[1] the transfer provisions of 28 U.S.C. 2112(a)[2] did not apply. There does not appear to be any barrier to concurrent consideration of the several cases by the two courts of appeals, even assuming that some question might have been raised if the first petition for review of the order had been filed in the District of

[1] On this date a petition to review the Board's "all agreements" order, in issue here, was filed in the Second Circuit in *States Marine Lines, Inc. et al.* v. *United States and Federal Maritime Board*, Case No. 26318 (C.A. 2) and the District of Columbia Circuit in *Montship Lines Ltd., et al.* v. *United States and Federal Maritime Board*, Case No. 15,783 (C.A.D.C.). The *Kerr* case (No. 26334) in which the Second Circuit rendered its decision (because there, unlike *States Marine*, stay had been sought and granted) was filed on June 10, 1960.

[2] This section in relevant part provides:

"* * * If proceedings have been instituted in two or more courts of appeals with respect to the same order the * * * board * * * shall file the record in that one of such courts in which a proceeding with respect to such order was first instituted. The other courts in which such proceedings are pending shall thereupon transfer them to the court of appeals in which the record has been filed. * * *"

Columbia Circuit but the Second Circuit had nonetheless proceeded to decision in the case before it.[3]

In view of the fact that the cases pending before the Court of Appeals for the District of Columbia Circuit were argued on January 16, 1961, and are now under consideration by that court, it would seem appropriate for this Court to defer action upon the instant petition to await the determination of the pending cases in the District of Columbia Circuit. (We shall, of course, promptly file with the Court copies of the opinions and decisions rendered in those cases.) Such a procedure would not substantially affect the progress of the Board's current investigation. Only ten carriers are involved in the present petition, and, while their compliance with the Board's order has been stayed pending action on the petition, the operation of the order has in any event been stayed pending appeal with respect to the approxi-

[3] The legislative history of Section 2112 makes clear that its purpose was to eliminate the duplication of often voluminous agency records and the other expenses of multiple proceedings to review the same administratve order, and to permit the courts of appeals, rather than the agency (as had been the former practice, see *Columbia Oil & Gasoline Corp.* v. *SEC*, 134 F. 2d 265 (C.A. 3)), to determine which forum would best serve the convenience of the parties. See H. Rept. 842, 85th Cong., 1st Sess., pp. 4–5, 29; Sen. Rept. 2129, 85th Cong., 2d Sess., pp. 1, 4; Hearings Before Subcommittee No. 3, Committee on the Judiciary, House of Reps., 84th Cong., 2d Sess., May 17, 1956, pp. 11–12, 13, 14, 30.

mately 190 petitioners and intervenors involved in the pending District of Columbia Circuit cases.

Respectfully submitted.

ARCHIBALD COX,
Solicitor General.

JAMES L. PIMPER,
General Counsel,
Federal Maritime Board.

FEBRUARY 1961.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No. 623 - 59

KERR STEAMSHIP CO., *et al.*,
Petitioners

v.

UNITED STATES OF AMERICA and
FEDERAL MARITIME BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE PETITIONERS

HERMAN GOLDMAN
ELKAN TURK
ELKAN TURK, JR.
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Counsel for the Petitioners
120 Broadway
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No. 623

KERR STEAMSHIP CO., *et al.*,
Petitioners

v.

UNITED STATES OF AMERICA and
FEDERAL MARITIME BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE PETITIONERS

The petition herein seeks review of a decision of the Court of Appeals for the Second Circuit, affirming an Order of the Federal Maritime Board issued under the purported authority of §21 of the Shipping Act, 1916, as amended (46 U.S.C. §820). That Order would have required all common carriers by water subject to the Act to file with the Board copies of a multitude of assorted agreements—located in numerous ports throughout the world.

The Memorandum for the respondents, notwithstanding their position on the merits, suggests that

this Court may wish to defer action on our petition pending disposition of consolidated cases in the Court of Appeals for the District of Columbia Circuit (*Moutship Lines Limited, et al.* v. *United States of America, et al.*, Nos. 15,783, *et al.*).

We concur in the respondents' suggestion.

The question of the validity of the Board's Order, which is the subject of the instant proceeding, is also squarely presented in the District of Columbia Circuit cases. We need not elaborate upon the considerations of justice and uniformity in the administration of the Shipping Act which militate in favor of deferred action. Certainly, the present petitioners have no interest which would be adversely affected by deferment.

Respectfully submitted,

HERMAN GOLDMAN
ELKAN TURK
ELKAN TURK, JR.
SOL D. BROMBERG
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120 Broadway
New York 5, N. Y.

Dated: New York, N. Y.,
February 3rd, 1961.

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No. 29

In the Supreme Court of the United States

OCTOBER TERM, 1961

KEER STEAMSHIP CO., ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA AND FEDERAL MARITIME BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

SUPPLEMENTAL MEMORANDUM FOR THE RESPONDENTS

ARCHIBALD COX,
Solicitor General,
Department of Justice, Washington 25, D.C.

ROBERT B. MITCHELL,
Assistant General Counsel,
Federal Maritime Commission,
Washington 25, D.C.

In the Supreme Court of the United States

OCTOBER TERM, 1961

No. 29

KERR STEAMSHIP CO., ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA AND FEDERAL MARITIME BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

SUPPLEMENTAL MEMORANDUM FOR THE RESPONDENTS

Petitioners seek review of a judgment of the Court of Appeals for the Second Circuit which affirmed an order of the Federal Maritime Board requiring every common carrier by water subject to the Shipping Act, 1916 to file with the Board copies of certain agreements. In our memorandum filed on February 1, 1961, we noted that the same order was also under review before the Court of Appeals for the District of Columbia Circuit in *Montship Lines, Limited, et al.* v. *Federal Maritime Board and United States* (No. 15,783 *et al.*); and we suggested that, although we believed the decision below in the present case to be correct and further review to be unwarranted, the

Court should defer action on the petition pending the disposition of the *Montship* cases. By memorandum dated February 3, 1961, the petitioners concurred in the suggestion of deferral.

On June 30, 1961, the Court of Appeals for the District of Columbia Circuit decided the *Montship* case. The opinion, which has not yet been reported, is set forth in the Appendix, *infra,* pp. 5–21. The court there rejected various challenges to the Board's statutory authority to issue the order. It held, however, that since the order did not state the purpose for which the information demanded by the Board was sought, it was impossible to determine whether the material sought was relevant to the Board's inquiry. Ruling that the order was therefore "fatally defective," the court vacated it and remanded the case to the Board for further proceedings not inconsistent with the opinion (*infra,* pp. 17–18).

The government does not intend to seek review of that decision. The Federal Maritime Commission, which on August 12, 1961, succeeded to the regulatory powers and duties of the Federal Maritime Board (Reorganization Plan No. 7 of 1961, H. Doc. 187, 87th Cong., 1st Sess.) is now considering what action it should take to correct the deficiency in the order to which the court of appeals pointed in the *Montship* case. The Commission is expected to decide the matter in the near future. Any new order that the Commission may issue will probably apply to the petitioners

in the instant case, and may well affect the issues raised by the petition, particularly those relating to the alleged vagueness and unreasonableness of the order (see Pet., pp. 3–4).

In these circumstances, we suggest that it would be appropriate for this Court further to defer action upon the instant petition, until the Commission has decided what action it will take upon the remand in the *Montship* case. Such a further deferral cannot injure or prejudice the petitioners, since the duty of compliance with the Board's order has been stayed pending the disposition of the instant petition.

We shall, of course, promptly advise the Court as to the action of the Commission upon the remand from the Court of Appeals for the District of Columbia Circuit, and state our views as to the proper disposition of the petition in the light of the Commission's action.

Respectfully submitted.

ARCHIBALD COX,
Solicitor General.

ROBERT E. MITCHELL,
Assistant General Counsel,
Federal Maritime Commission.

SEPTEMBER 1961.

APPENDIX

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Nos. 15783–809, 15814, 15838, 15857, 15860, 15879–80, 15901–02, 15904, 15911, 15917, 15920–22, 15938, 15947, 15982–83

MONTSHIP LINES, LIMITED, ET AL., PETITIONERS

v.

FEDERAL MARITIME BOARD and THE UNITED STATES OF AMERICA, RESPONDENTS

ON PETITIONS TO REVIEW AN ORDER OF THE FEDERAL MARITIME BOARD

Decided June 30, 1961

Before PRETTYMAN, BAZELON and WASHINGTON, Circuit Judges.

BAZELON, *Circuit Judge:* Pursuant to the Judicial Review Act of 1950, 5 U.S.C. §§ 1031–1042 (1958), one hundred and eighty-three alien corporations engaged in the common carriage of cargo and passengers by water between the United States and foreign countries[1] bring these petitions to review an order of the Federal Maritime Board entered April 11, 1960, under

[1] In addition there are five petitioners which are domestic corporations and two petitioners which contend that as of the date of the Board's order they were not engaged in the common carriage of cargo or passengers between the United States and foreign countries.

§ 21 of the Shipping act of 1916.[2] This order requires every common carrier by water subject to the Act to file "a list identifying every contract, agreement or understanding, involving the water-borne commerce of the United States," which was in effect as of January 1, 1960, between the carrier and "any other common carrier by water * * * or with any freight forwarder, terminal operator, stevedore, or ship's agent * * * which related or pertained to" seven specified subjects.[3] In addition, each carrier was required to file with the Board copies of every such agreement not previously filed. The carriers were required to certify under oath that the documents

[2] Section 21, 46 U.S.C. § 820 (1958), provides:

"The Federal Maritime Board and the Secretary of Commerce may require any common carrier by water, or other person subject to this chapter, or any officer, receiver, trustee, lessee, agent, or employee thereof, to file with it or him any periodical or special report, or any account, record, rate, or charge, or any memorandum of any facts and transactions appertaining to the business of such carrier or other person subject to this chapter. Such report, account, record, rate, charge, or memorandum shall be under oath whenever the Board or Secretary so requires, and shall be furnished in the form and within the time prescribed by the Board or Secretary. Whoever fails to file any report, account, record, rate, charge, or memorandum as required by this section shall forfeit to the United States the sum of $100 for each day of such default.

"Whoever willfully falsifies, destroys, mutilates, or alters any such report, account, record, rate, charge, or memorandum, or willfully files a false report, account, record, rate, charge, or memorandum shall be guilty of a misdemeanor, and subject upon conviction to a fine of not more than $1,000, or imprisonment for not more than one year, or to both such fine and imprisonment."

[3] For the full text of the Board's order, see Appendix.

submitted were true and complete records of the agreements called for.

The petitioners filed motions for reconsideration of the Board's order. In each instance the Board denied these motions on the merits without hearing. The orders denying these motions are also before us on review.

Petitioners and respondents join issue on a number of matters. We shall deal first with those questions pertaining to our jurisdiction to review the Board's § 21 order. Then we shall consider the general issues affecting all petitioners. Finally we shall turn to the special issues which are raised by and which affect only certain of the petitioners.

I. JURISDICTION

A. Effect of 28 U.S.C. § 2112

On June 8, 1960, the first of the instant petitions to review the Board's § 21 order were filed in this court. On the same date a similar petition was filed by States Marine Lines in the United States Court of Appeals for the Second Circuit. Two days later another petition was filed in the Second Circuit by Kerr S.S. Co.

A certified index of the record was filed in this court on October 3, 1960. This is equivalent to filing of the record itself, under 28 U.S.C. § 2112(a). We are advised that neither the record nor any index of the record was at any time filed in the Second Circuit. On October 31, 1960, the Second Circuit upheld the Board's order and denied Kerr's petition. *Kerr S.S. Co.* v. *United States,* 284 F. 2d 61. The question initially presented is whether in light of the applicable statutory provisions the Second Circuit's action precludes our review.

Section 1036 of Title 5, U.S.C. (1958), provides in part:

> * * * the agency shall file in the office of the clerk of the court of appeals in which the proceeding is pending the record on review, as provided in section 2112 of Title 28.

Section 2112(a) of Title 28 provides in part:

> * * * If proceedings have been instituted in two or more courts of appeals with respect to the same order the agency * * * concerned shall file the record in that one of such courts in which a proceeding with respect to such order was first instituted. The other courts in which such proceedings are pending shall thereupon transfer them to the court of appeals in which the record has been filed. For the convenience of the parties in the interest of justice such court may thereafter transfer all the proceedings with respect to such order to any other court of appeals.

It is clear, in light of these statutory provisions that we have jurisdiction. The mere fact that petitions for review of the same order were filed in the Second Circuit and that that court has already upheld the order does not oust this court of jurisdiction. The question whether the Second Circuit had jurisdiction to decide *Kerr* in light of 28 U.S.C. § 2112(a) and 5 U.S.C. § 1039(a) (1958)[4] is not before us.

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[4] This section provides:

"Upon the filing and service of a petition to review, the court of appeals shall have jurisdiction of the proceeding. The court of appeals in which the record on review is filed, on such filing, shall have jurisdiction to vacate stay orders or interlocutory injunctions theretofore granted by any court, and shall have exclusive jurisdiction to make and enter, upon the petition, evidence, and proceedings set forth in the record on review, a judgment determining the validity of, and enjoining, setting aside, or suspending, in whole or in part, the orders of the agency."

B. Timeliness of Certain Petitions to Review

Section 4 of the Review Act, 5 U.S.C. § 1034 (1958), provides in part:

> Any party aggrieved by a final order reviewable under this chapter may, within sixty days after entry of such order, file in the court of appeals * * * a petition to review such order.

Eleven of the petitioners[5] sought judicial review of the order of April 11 more than sixty days after the order was served, but within sixty days after the Board acted upon their motions for reconsideration of that order. The Maritime Board asserts that these petitions to review are untimely and seeks their dismissal. We think it clear, however, that the petitions in question were timely filed under our decision in *Outland* v. *Civil Aeronautics Board*, —— U.S.App. D.C. ——, 284 F. 2d 224 (1960), where we held that the statutory sixty-day period for seeking judicial review of Civil Aeronautics Board orders did not commence until the Board acted upon Outland's motion for rehearing.[6]

The Maritime Board urges, however that *Outland* is inapplicable since none of the motions for reconsideration we discuss were filed with the Board within the thirty-day period provided by Rule 16 of its Rules of Practice and Procedure. But we agree with peti-

[5] Compania Anonima Venezolana de Navegacion; Pacific Shipowners, Ltd.; Orient Mid-East Lines, Inc.; Jugoslavenska Linijska Plovidba; Splosna Plovba; Navigazione Alto Italia, S.p.A.; Societa Italiana di Armemento "Sidarma"; Black Star Lines, Ltd., Compania Colombiana de Navegazion Maritima, Ltd.; Compania Maritima Orlanda, S.A.; Marina Mercante Nicaraguense, S.A.

[6] The controlling statute in the *Outland* case, 49 U.S.C. § 1486(a) (1958), provides that "any order * * * issued by the Board * * * shall be subject to review * * * upon petition, filed within sixty days after the entry of such order. * * *

tioners that the Board's consideration of these motions on their merits constituted a waiver of the Board's own limitation period. Cf. *Bowman* v. *Loperena*, 311 U.S. 262 (1940); *City of Pittsburgh* v. *Federal Power Comm'n*, 99 U.S. App. D.C. 113, 237 F. 2d 741 (1956). Although a court's or agency's consideration of an untimely motion for rehearing or reconsideration may not constitute a waiver of a limitation period fixed by Congress,[7] we think the rule is otherwise when the limitation period is imposed by the agency.

C. Intervention

Section 8 of the Review Act, 5 U.S.C. § 1038 (1958), provides in part:

> * * * any party or parties in interest in the proceeding before the agency whose interests will be affected if an order of the agency is or is not enjoined, set aside, or suspended, may appear as parties thereto of their own motion and as of right, and be represented by counsel in any proceeding to review such order. Communities, associations, corporations, firms, and individuals, whose interests are affected by the agency's order, may intervene in any proceeding to review such order.

A number of the carriers subject to the Board's order filed notices of intention to intervene[8] or motions for leave to intervene in the instant review proceedings. Most of them also filed petitions to review which we hold above to be timely.[9] But four of the carriers

[7] Cf. *Safeway Stores* v. *Coe*, 78 U.S. App. D.C. 19, 136 F. 2d 771 (1943).

[8] For our present purposes, we treat the notices of intention to intervene as motions for leave to intervene.

[9] We dismiss as moot the motions for leave to intervene filed by carriers which also filed petitions to review held timely herein.

seeking intervention did not file petitions to review."[10]

Assuming *arguendo* that these four are not "parties in interest in the proceeding before the agency" as is required for intervention as a matter of right, it is clear that they are parties "whose interests are affected by the agency's order" and we have discretion under the statute to permit intervention. Allowing these carriers to intervene would not in any appreciable way further complicate this litigation. The Board has not shown that it will be prejudiced by intervention, and the questions raised by the intervenors are identical to those raised in the cases in which intervention is sought. The motions for leave to intervene will, therefore, be granted.

II. GENERAL ISSUES

A. Authority under Section 21

Petitioners advance three contentions as to why the instant order falls outside the authority conferred on the Board by § 21 of the Shipping Act. They argue: (1) § 21 does not cover "contracts, agreements, and understandings"; (2) § 21 is limited to obtaining information relevant to the Board's "regulatory" power over carriers' rates under §§ 17 and 18; and (3) § 21 does not authorize the Board to compel the production of documents located outside the territorial confines of the United States.

Petitioners' first contention is properly answered in *Kerr:* namely, that, although § 21 does not expressly speak of "contracts, agreements or understandings" it is clear that such papers are encompassed within the broad language of the section which requires carriers and other persons subject to the Act to file "any ac-

[10] Americana Shipping Corp.; Kvarnerska Plovidba; Wegal A.B. (Totem Line); Skibsaktieselskapet Solstad.

count, record, rate, or charge, or any memorandum of any facts and transactions appertaining to the business of such carrier or other person subject to this chapter." Mutual dealings between parties culminating in consensual arrangements are clearly "transactions." And the writings evidencing the arrangements arrived at are just as clearly "memoranda." Therefore, the instant order falls within the scope of § 21.

Petitioners present an elaborate argument based upon the legislative history of § 21. They contend that section is modeled upon § 20 of the Interstate Commerce Act, 34 Stat. 594 (1906), and that a year before the enactment of the Shipping Act the Supreme Court in *United States* v. *Louisville & N. R.R.*, 236 U.S. 318 (1915), limited the similar language of § 20 to cover only accounting and bookkeeping records. Assuming *arguendo* that petitioners' claims are correct, there is good reason why they should not be followed and why § 21 should not be given a similarly restrictive meaning. In *Louisville* the Interstate Commerce Commission had attempted to inspect the railroad's correspondence under § 20. Had the Supreme Court upheld the Commission's authorization to do so under § 20, it would have been forced to resolve the question whether such inspection constituted an unreasonable search and seizure. Under the Court's then view of the Fourth Amendment's limitation on the compusory production of corporate records and documents—a view no longer followed, compare *Federal Trade Commission* v. *American Tobacco Co.*, 264 U.S. 298 (1924), with *Oklahoma Press Pub. Co.* v. *Walling*, 327 U.S. 186 (1946); and *United States* v. *Morton Salt Co.*, 338 U.S. 632 (1950)—the Court would probably have had to answer that question in the affirmative. Be-

cause the prevailing views on the constitutional question led to a restrictive reading of § 20 of the Interstate Commerce Act in 1915 does not seem to us to justify a similarly restrictive reading of § 21 of the Shipping Act today when these views are no longer followed.

In addition it should be noted that in *Louisville* the Supreme Court defined "records" as used in § 20 of the Interstate Commerce Act to include "the written evidence of [a corporation's] * * * contracts and business transactions."[11] Section 21 of the Shipping Act also speaks of "records," and consequently the *Louisville* case may be read as supporting the Board's authority under that section.

Petitioners' second contention is that § 21 is limited to enabling the Board to obtain information relevant to carrying out its supervisory power over carriers' rates under §§ 17 and 18 and is therefore inapplicable where the Board is seeking information to determine whether the prohibitions of §§ 14–16 are being complied with. We find no basis in the Shipping Act for this bifurcation of the Board's authority. Furthermore, petitioners' claim would appear to be laid at rest by the Supreme Court's description of § 21 in *Isbrandtsen-Moller Co.* v. *United States*, 300 U.S. 139, 144–45 (1937):

> The purpose of § 21 is not far to seek. Other sections forbid allowance of rebates, require the filing of agreements fixing or regulating rates, granting special rates, accommodations or privileges, which may be disapproved, cancelled or modified if the board finds them unjustly discriminatory or violative of the act, prohibit undue or unreasonable preferences or the cutting of established rates and unjust discrimination between shippers or ports. To en-

[11] 236 U.S. at 334.

> able it to perform its functions the board may well need such information as that which the section gives it power to demand.

This quotation refers to the Board's responsibilities under §§ 14–16 as well as §§ 17 and 18. It is apparent that § 21 is not to be restricted to what petitioners characterize as the "regulatory" as opposed to the "enforcement" sections of the Act.

Petitioners finally contend that, since § 21 does not expressly authorize the Board to require the production of records or memoranda located outside the territorial confines of the United States, that power ought not to be implied. In support of this argument, they point to § 27 of the Shipping Act, 46 U.S.C. § 826 (1958), under which the Board "for the purpose of investigating alleged violations" may subpoena witnesses or documents "from any place in the United States at any designated place of hearing." Petitioners contend this restriction should be read into § 21. We think not.

It is questionable whether the Board is in fact powerless under § 27 to subpoena documents outside the territorial confines of the United States. Cf. *Securities & Exchange Comm'n* v. *Minas De Artemisa, S.A.*, 150 F. 2d 215 (9th Cir. 1945), in which a similar description of the Security and Exchange Commission's subpoena power under § 22(b) of the Securities Act of 1933 was held not to preclude the Commission from compelling persons within the United States to produce documents of foreign corporations situated outside this country.

In any event, in light of the coverage and the purposes of the Shipping Act, we can see no reason to restrict § 21 to cover only information within the United States. In enacting the Shipping Act, which deals with foreign as well as interstate commerce,

Congress was clearly mindful of the fact that foreign flag as well as United States carriers were subject to regulation thereunder. See H.R. Rep. No. 659, 64th Cong., 1st Sess. (1916). If the Board's investigatory powers were limited to the territorial confines of the United States, regulation of foreign flag carriers would be hampered to a substantial degree. Consequently, we will not read into § 21 a territorial limitation which appears to be contrary to the purposes of the Shipping Act.

We must reject petitioners' contentions regarding protests of foreign governments and extra-territorial enforcement of the Board's order. As the Second Circuit pointed out in *Kerr*, the protests of foreign governments are matters for consideration by the Executive and not the courts. And the question as to whether the order can be enforced by extra-territorial means is not presently before us. All that is here involved is whether the order was properly and validly issued.

B. Notice of Proposed Issuance of a Section 21 Order

Petitioners next contend that because the § 21 order is industry-wide in application it is analogous to rule-making and the Board was required to give notice of the proposed issuance of the order to interested parties so they could submit their views and arguments. Clearly the order is not legislative in character. In any event, notice and hearing are not prerequisite to the issuance of such an order directed to a single carrier. *Isbrandtsen-Moller Co.* v. *United States, supra.* That the Board chose in this instance as a matter of convenience to issue one order directed to many carriers rather than to issue many orders each directed to a single carrier does not convert the instant order into the promulgation of a rule.

C. The Fourth Amendment

The Board's order does not state the purpose for which the information is demanded. For this reason, among others, petitioners contend that the order violates the Fourth Amendment.[12]

Although earlier limitations on the investigatory powers of administrative agencies have been relaxed in recent years,[13] the Supreme Court has informed us that "a governmental investigation into corporate matters may be of such a sweeping nature and so unrelated to the matter properly under inquiry as to exceed the investigatory power. * * * But it is sufficient if the inquiry is within the authority of the agency, the demand is not too indefinite and the information sought is reasonably relevant. 'The gist of the protection is in the requirement, expressed in terms, that the disclosure sought shall not be unreasonable.' *Oklahoma Press Publishing Co.* v. *Walling*, 327 U.S. 186, 208." *United States* v. *Morton Salt Co.*, 338 U.S. 632, 652–53 (1950).

What is "reasonably relevant" depends on the purpose and nature of the investigation undertaken by the agency. "[R]elevancy and adequacy or excess in the breadth of the subpoena are matters variable in relation to the nature, purposes and scope of the inquiry." *Oklahoma Press Pub. Co.* v. *Walling*, 327

[12] Although this matter was argued in the briefs in the *Kerr* case, the Second Circuit's opinion does not appear to resolve this issue. We note that the court's opinion does not appear to state the purpose of the Board's order:

> "It does not appear that any of the petitioners tried to show what was the financial burden of listing and copying the contracts in question, or that it was out of all reasonable proportion to *any purpose that the proposed investigation might have*." 284 F. 2d at 64, emphasis supplied.

[13] See *Oklahoma Press Pub. Co.* v. *Walling*, 327 U.S. 186 (1946).

U.S. 186, 209 (1946). And as Professor Davis has pointed out, "the breadth of a subpena or of a search made in records may be excessive, but the test is relevance to the specific purpose, and the purpose is determined by the investigators." 1 DAVIS, ADMINISTRATIVE LAW TREATISE § 3.06 (1958). Consequently, the Board's failure in the instant case to state its purpose in requiring the information demanded precluded a determination of relevancy.

Respondents, relying on *Morton Salt,* contend that no detailed specification of purpose is necessary when an agency is investigating "merely on suspicion that the law is being violated, or even because it wants assurance that it is not." [14] If this order is pursuant to such an investigation, a matter which the Board contends in its brief but which does not appear from the face of the order, it might be argued that a *detailed* specification at this stage of "initial inquiry" may not be feasibly required. Whatever may be the validity of that argument, we think it cannot excuse the absence of any indication whatsoever, as in the instant order, of the investigation's purpose since no basis is thereby afforded for determining the relevancy of the information demanded. And just as the reasons underlying agency action must appear from the agency's order, so too we think that the statement of purpose must be apparent from the order itself and cannot be supplied by contentions in the briefs.

In any event, the language in *Morton Salt* upon which the Government relies was not directed to the matter of purpose and relevancy, but rather to the issue of whether the Federal Trade Commission had power to compel reports absent "probable cause" to believe that the law was being violated.

[14] 338 U.S. at 642–43.

The Government also points to *Isbrandtsen-Moller Co.* v. *United States, supra;* and *Bowles* v. *Northwest Poultry & Dairy Products Co.*, 153 F. 2d 32 (9th Cir. 1946), for the proposition that statements of purpose are unnecessary. In *Isbrandtsen-Moller* which, like the insant case, involved an investigatory order pursuant to § 21 of the Shipping Act, the order recited:

> It appearing, That full and complete information as to the rates and charges for or in connection with the transportation of certain property from continental United States to points in foreign countries by carriers by water in foreign commerce subject to the Shipping Act, 1916, is necessary to the proper administration of the regulatory provisions of said act. * * *[15]

This order, stating the subject of the investigation to be rates and charges, provided a standard for determining the relevancy of the documents demanded. Similarly, the order involved in *Northwest Poultry* contained a sufficient statement of purpose and relevancy since the records there required were needed in order to determine whether the corporation had complied with a particular Regional Price Order under the Emergency Price Control Act.

Since the reasonableness of the order under review is dependent upon the relevancy of the information demanded, and that cannot be determined in the absence of a statement of purpose, the order is fatally defective. Because petitioners' contentions regarding the breadth and the vagueness of the order are in part dependent upon the question of relevancy, we find it unnecessary to presently deal with them. The order under review is vacated and the case remanded to the

[15] *Isbrandtsen-Moller Co.* v. *United States*, 14 F. Supp. 407, 408 (S.D.N.Y. 1936).

Board for proceedings not inconsistent with this opinion.

III. SPECIAL ISSUES

A. Local Foreign Law Prohibiting Disclosure

Several petitioners,[16] foreign steamship lines of Yugoslavia and Netherlands nationality assert that the production by them of documents required by the Board's § 21 order would be violative of their local national law. They point to provisions of the Yugoslav Criminal Code and the Netherlands Economic Competition Law which they contend preclude compliance with the Board's order.

Prior to determining whether these foreign laws do in fact forbid the production of documents such as those required by the Board's order and, if so, what effect this should have upon compliance, the appropriate procedure is to require these petitioners to make a good faith attempt to obtain a waiver of such restrictions from their respective governments. *United States* v. *Standard Oil Co.* (*N.J.*), 23 F.R.D 1 (S.D.N.Y. 1958); *Societe Internationale, etc.* v. *McGranery,* 111 F. Supp. 435 (D.D.C. 1953), *affirmed sub nom. Societe Internationale, etc.* v. *Brownell,* 96 U.S. App. D.C. 232, 225 F. 2d 532 (1955), *cert. denied,* 350 U.S. 937 (1956); *Societe Internationale, etc* v. *Brownell,* 100 U.S. App. D.C. 148, 243 F. 2d 254 (1957), *reversed and remanded sub nom. Societe Internationale, etc.* v. *Rogers,* 357 U.S. 197 (1958).

[16] Koninklijke Nederlandsche Stoomboot Maatschappij, N.V.; N.V. Stoomvaart Maatschappij "Nederland"; Koninklijke Rotterdamsche Lloyd, N.V.; N.V. Nederlandsch-Amerikaansche Stoomvart Maatschappij ("Holland Amerika Lijn"); Nederlandsche Stoomvart Maatschappij "Oceaan," N.V.; Oranje Lijn (Maatschappij Zeetransport), N.V.; Jugoslavenska Linijska Plovidba; Splosna Plovba; Karenska Plovidba.

Consequently, these petitioners should upon the remand bring any arguments that their local law prohibits compliance before the Board so that it can then initially determine whether petitioners have made a good faith effort to secure waivers and, if so, whether compliance is to be required.

B. Jurisdiction Over Certain Petitioners

Two of the petitioners [17] contend that they are not subject to the order since on the date of that order neither of them was a common carrier by water engaged in the foreign commerce of the United States. One petitioner contends that it terminated all service with the United States in November 1959, while the other contends it terminated service in February 1960.

Assuming *arguendo* that these petitioners would not be subject to the Board's order if they had permanently terminated their service to or from the United States before April 11, 1960, this court has nothing before it to show such termination other than declarations of petitioners in their briefs. This clearly seems to be a matter upon which evidence should be taken to determine the nature and extent of the cessation of these petitioners' activities. Consequently, on remand these petitioners should bring their contentions before the Board so it can have the opportunity to pass upon this issue in the light of an adequate factual record which can be then made.

We consider it unnecessary to consider the other contentions raised by the petitioners at this time.

Order Vacated.

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[17] Prince Line Ltd.; Compania Espanola de Navegacion Maritima, S.A.

Federal Maritime Board Order, April 11, 1960

"Section 21 Order—Contracts, Agreements and Understandings of Common Carriers by Water."

By virtue of the authority vested in it by section 21 of the Shipping Act, 1916 (46 U.S.C. 820), the Federal Maritime Board hereby orders every common carrier by water subject to said Act, including but without limitation, those named in Appendix A attached hereto and made part hereof, to file with it on or before July 15, 1960, the following:

1. A list identifying every contract, agreement or understanding, involving the water-borne commerce of the United States, which it has entered into with any other common carrier by water and/or common carriers by water, and/or with any freight forwarder, terminal operator, stevedore, or ship's agent which was in effect as of January 1, 1960, which relates or pertains to:

(a) the fixing or regulating of rates, fares, charges or practices for the loading, unloading, handling, transporting, storing, or delivering of property or passengers;

(b) the giving or receiving of special rates, fares, accommodations, or other special privileges or advantages;

(c) the controlling, regulating, preventing or destroying of competition;

(d) the pooling or apportioning of earnings, losses or traffic or the joint use of equipment or facilities;

(e) the allotting of ports or the restricting or otherwise regulating of the number and character of sailings between ports;

(f) the limiting of, or regulating of, in any way, the volume or character of freight or passenger traffic to be carried or to be received, handled, stored or delivered;

(g) the providing for, in any manner, of an exclusive, preferential, or cooperative working arrangement.

Documents filed for approval under section 15 of said Act (46 U.S.C. 814) may be identified by citation of the Federal Maritime Board number assigned thereto, and documents filed in the past year in response to another order issued pursuant to said section 21 may be identified by stating the dates of such order and response; as to others, specify the effective date and the parties.

2. A copy of every contract, agreement, or understanding identified on said list, which has not been filed for approval under said section 15, and has not been filed with the Board in the past year in response to an order issued pursuant to said section 21. If any such contract, agreement, or understanding is oral, it shall be set forth in a memorandum in sufficient detail to represent a true and complete record of the contract, agreement, or understanding.

3. A statement, under oath, by a duly authorized officer of the carrier, that the records submitted in response to items 1 and 2 above are true and complete records of all contracts, agreements and understandings of the character or nature required to be filed by this Order, to which such carrier was a party as of January 1, 1960.

By the Federal Maritime Board.

Date: April 11, 1960

JAMES L. PIMPER,
Secretary.

U.S. GOVERNMENT PRINTING OFFICE: 1960

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 29

KERR STEAMSHIP CO., et al.,
Petitioners,

v.

UNITED STATES OF AMERICA and
FEDERAL MARITIME COMMISSION.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

SUPPLEMENTAL MEMORANDUM FOR THE PETITIONERS

HERMAN GOLDMAN,
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SUPPLEMENTAL MEMORANDUM FOR THE PETITIONERS

In their supplemental memorandum of September, 1961, respondents call to the Court's attention the decision in *Moatship Lines, Limited, et al.* v. *Federal Maritime Board and United States* (D.C. Cir. June 30th, 1961), — App. D.C. —, — F. 2d —, Pike & Fischer Shipping Reg. Rep. 20100. Consideration of the petition herein apparently has been deferred pending the announcement of the District of Columbia Circuit decision in the *Moatship Cases*, where the same Federal Maritime Board Order was under review.

We cannot concur in the present suggestion of the respondents that consideration of the instant petition

be further deferred until the Federal Maritime Commission shall have completed its deliberations and taken action to correct the deficiency in the Order under review which moved the Court of Appeals for the District of Columbia Circuit to find it fatally defective and to vacate it. Since the announcement of the District of Columbia decision, Reorganization Plan No. 7 of 1961 (H. Doc. 187, 87th Cong., 1st Sess.; 1961 U.S. Code Cong. & Adm. News 2295, *et seq.*), has abolished the Federal Maritime Board, which issued the Order under review, and created the Federal Maritime Commission. The Commission is presently staffed by five Acting Commissioners serving under 90-day appointments (Reorganization Plan No. 7, §302, 1961 U.S. Code Cong. & Adm. News 2297). The President has nominated four of the five permanent Commissioners. Those named include only one of the Acting Commissioners. It is not yet known whether the permanent Commissioners will succeed the Acting Commissioners before the end of the 90-day period.

In view of the fluctuating status of the administrative agency, it is reasonable to assume that a considerable period will elapse before thoroughly considered action will be taken in conformity with the District of Columbia decision. Whether that action will in any way affect the petitioners is unpredictable. While the petitioners are, by the stay issued below, protected against enforcement of the Order pending final disposition of their petition, the issues involved are of great importance to the field of regulation of ocean carriers and, insofar as they include the Constitutional point on which the District of Columbia decision turned, are of importance to the procedures of Federal administrative agencies generally.

Apart from the questions as to the reach of §21 of the Shipping Act, 1916, as amended (46 U.S.C. §820), the instant petition raises the far broader question whether the decision of this Court in *United States* v. *Morton Salt Co.*, 338 U.S. 632 (1950), represents a real protection against the unfettered indulgence of administrative curiosity, or whether it is a high-sounding but empty promise of the interposition of the courts between the people and the potential oppressions of government — a promise to be honored in the breach rather than the observance.

We submit that the resolution of the questions presented, particularly in the presence of a conflict between decisions of the Courts of Appeals for the Second and District of Columbia Circuits, should not be further deferred pending the tortuous course of administrative deliberation.

Respectfully submitted,

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Dated: New York, N. Y.
October 3rd, 1961.

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No. 29

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v.

UNITED STATES OF AMERICA AND
FEDERAL MARITIME BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE RESPONDENTS SUGGESTING MOOTNESS

ARCHIBALD COX,
Solicitor General,
Department of Justice, Washington 25, D.C.

JAMES L. PIMPER,
General Counsel,
Federal Maritime Board,
Washington 25, D.C.

In the Supreme Court of the United States

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE RESPONDENTS SUGGESTING MOOTNESS

The decision below (284 F. 2d 61) affirmed an order of the Federal Maritime Board issued under Section 21 of the Shipping Act (46 U.S.C. 820) requiring every common carrier by water subject to the Shipping Act, 1916, as amended, to file with the Board copies of specified types of agreements. On February 1, 1961, respondents filed a memorandum suggesting that the Court defer action on the petition for certiorari pending disposition of a group of related cases arising out of the same order which were then *sub judice* before the Court of Appeals for the District of Columbia Circuit. Petitioners concurred in this suggestion.

On June 30, 1961, the District of Columbia Circuit issued its decision in the related cases. *Montship Lines, Ltd.* v. *United States*, 295 F. 2d 147. It held that the Board had authority under Section 21 of the Shipping Act to require carriers to submit such reports. It further held, however, that since the order did not set forth the purpose for which the particular information was sought, the court could not determine the relevancy of the information demanded and, therefore, could not determine the reasonableness of the order. The court vacated the order and remanded the case to the Board for further proceedings.

On September 28, 1961, respondents filed in this Court a supplemental memorandum, stating that they did not intend to seek review in the *Montship* case, and, suggesting that the Court should defer action on the petition until the Federal Maritime Commission (which succeeded to the powers and duties of the Federal Maritime Board on August 12, 1961) could reconsider the order. This suggestion was opposed by petitioners in a memorandum dated October 3, 1961.

On February 9, 1962, the Federal Maritime Commission issued an order (set forth in the Appendix, *infra*) reversing and vacating, as to petitioners and others, the Board's Section 21 order of April 11, 1960, so as to put them on a par with the carriers who secured relief in the *Montship* case. Since the only question raised in the petition for certiorari is the validity of the order of April 11, 1960, the vacation of that order has rendered this case moot. "Where by an act of the parties, * * * the existing con-

troversy has come to an end, the case becomes moot and should be treated accordingly." (*United States* v. *Alaska S. S. Co.*, 253 U.S. 113, 116.) It is therefore suggested that the petition for a writ of certiorari should be granted, the judgment below should be vacated, and the case should be remanded to the court of appeals with directions to dismiss the petition for review as moot. *United States* v. *Munsingwear Inc.*, 340 U.S. 36, 39–40; *Securities and Exchange Commission* v. *Engineers Public Service Company*, 332 U.S. 788; *Eastern Air Lines, Inc.* v. *Civil Aeronautics Board*, 341 U.S. 901; *Securities and Exchange Commission* v. *Philadelphia Co.*, 337 U.S. 901; see *A. L. Mechling Barge Lines* v. *United States*, 368 U.S. 324, 329–330.

Respectfully submitted.

ARCHIBALD COX,
Solicitor General.

JAMES L. PIMPER,
General Counsel,
Federal Maritime Commission.

MARCH 1962.

APPENDIX

(Served February 9, 1962, Federal Maritime Commission)

At a Session of the FEDERAL MARITIME COMMISSION held at its office in Washington, D.C., on the 29th day of January, 1962

NOTICE OF REVERSAL OF SECTION 21 ORDER OF APRIL 11, 1960 AS TO CERTAIN CARRIERS

On April 11, 1960, the Federal Maritime Board issued an order entitled "Section 21 Order, Contracts, Agreements and Understandings of Common Carriers By Water." The order was directed to every common carrier by water subject to the provisions of the Shipping Act, 1916, and required them to file with the Board certain information.

Many of the carriers to whom the order of April 11, 1960 was directed filed petitions for judicial review in the United States Court of Appeals for the District of Columbia Circuit, and also obtained a stay of the order pending the Court's decision. On June 30, 1961, in *Montship Lines, Ltd. et al.* v. *United States*, 295 F. 2d 147, the Court vacated the order and remanded it to the Board for further proceedings, because it failed to state the purpose for which issued.

Other carriers to whom the Board's order of April 11, 1960 was directed petitioned for judicial review in the Court of Appeals for the Second Circuit. On October 31, 1960, in *Kerr Steamship Company, Inc., et al.* v. *United States*, 284 F. 2d 61, the Second Cir-

cuit affirmed the Board's order and dismissed that case. Thereafter, Kerr et al. petitioned the Supreme Court of the United States for a writ of certiorari, and this petition is currently pending. A similar suit, *States Marine Lines, et al.* v. *United States*, No. 26,328, is pending and unacted upon in the Second Circuit.

The District of Columbia Circuit's decision vacating the order as to the great majority of the carriers who sought judicial review, makes it necessary for the Federal Maritime Commission, as successor to the Board, to consider what further action should be taken. The Commission's consideration and treatment of the matter should, of course, be uniform, since all of the carriers involved, those who sued in the Second Circuit as well as those who sued in the District of Columbia Circuit, are affected by the same order. In furtherance of this purpose, the Commission deems it advisable to reverse and thus vacate the order as to the carriers who brought suit in the Second Circuit.

THEREFORE, IT IS ORDERED, pursuant to section 25 of the Shipping Act, 1916 (46 U.S.C. 824), That the Federal Maritime Board's order dated April 11, 1960 and entitled "Section 21 Order, Contracts, Agreements and Understandings of Common Carriers By

Water", is hereby reversed and vacated as to the following named common carriers by water:

States Marine Lines, Inc.;
Global Bulk Transport Corporation;
Global Transport, Ltd.;
Isthmian Lines, Inc.;
Kerr Steamship Company, Inc.;
Compania Maritima del Nervion;
Naviera Aznar S.A.;
Rex Line Rederiaktiebolaget; and

Skibsaktieselskapet Arizona Skibsaktieselskapet Astrea Skibsaktieselskapet Aruba Skibsaktieselskapet Noruega Skibsaktieselskapet Abaco, and A S Atlantica	conducting a joint common carrier service pursuant to FMC Agreement No. 7593, under the name Hoegh Lines.

By the Commission.

THOMAS LISI, *Secretary.*